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September 24, 2012

Jeff S. Jordan
Federal Election Commission
999 E Street, NW, 6th Floor
Washington DC 20463

Re: Response to Complaint, MUR 6617

Dear Mr. Jordan:

On behalf of House Majority PAC ("HMP"), and Shannon Roche in her official capacity as treasurer, this letter responds to the complaint received on August 9, 2012. The Commission should dismiss the complaint and close the file.

FACTUAL BACKGROUND

On July 23, 2012, HMP began airing an independent expenditure advocating the election of Christie Vilsack, a House candidate in Iowa's 4th congressional district.¹ As the chart below shows, HMP's ad features a teacher, Dawn Remsburg, talking to the camera. The message of the advertisement is that Ms. Vilsack has been a strong supporter of education funding, and has worked with both Republicans and Democrats toward this important policy goal.

TIME	AUDIO	ON-SCREEN CHYRON	VISUAL FOOTAGE	SOURCE OF FOOTAGE
:00	"Too often, critical funding for our schools gets caught up in red tape."		Children boarding a school bus.	Stock footage
:05	"When it should be all about the kids."		Dawn Remsburg talking to camera.	Original footage
:07	"Christie Vilsack	"Christie Vilsack,	Vilsack talking to	Obtained from

¹ See <http://www.thehousemajoritypac.com/ads/2012/07/23/christie-vilsack-independence-2/>. AFSCME and SEIU paid some production expenses and ran the same advertisement under their disclaimers.

	knows that. She was a teacher."	Teacher."	constituents.	"Christie Vilsack for Iowa Announcement" ²
:12	"And she was relentless in helping to lead the effort to make sure we got the funding we needed."	"Christie Vilsack, as first lady helped lead efforts for early childhood funding."	Teacher and students in classroom.	Stock footage
:15	"Working with Republicans and Democrats."	"Working with Republicans and Democrats."	Ms. Remsburg talking to camera.	Original footage
:18	"Christie knows it's not about partisan politics."		Ms. Remsburg talking to camera.	Original footage
:22	"That's who Christie Vilsack is. Independent-minded."	"Christie Vilsack, Independence."	Vilsack talking to constituent.	Obtained from "Christie Vilsack for Iowa Announcement" ³
:25	"We sure could use more of that."		Ms. Remsburg talking to camera.	Original footage
:27	"The House Majority PAC is responsible for the content of this advertising."	"Christie Vilsack, Independence for Iowa." Legal disclaimer.	Vilsack talking to constituents.	Obtained from "Christie Vilsack for Iowa Announcement" ⁴

This message was crafted by HMP and its union partners, independently of any candidate or political party committee. HMP and its partners drafted the script and on-screen chyrons from scratch, without relying on or incorporating any candidate materials. As a visual accompaniment to this message, HMP and its partners used several sources. The ad begins with stock footage of children boarding a bus and then features Ms. Remsburg, the teacher, talking directly to camera. Seven seconds in, the ad shows footage of Ms. Vilsack talking to constituents. The ad then alternates among these three footage sources, with footage of Ms. Vilsack on screen for between 11 and 12 seconds in total, and footage of Ms. Remsburg and the stock footage on screen for between 18 and 19 seconds.

HMP and its partners obtained the footage of Ms. Vilsack from the announcement video that her campaign uploaded to its YouTube channel on July 18, 2012. The announcement video lasts for one minute and forty-eight seconds, and consists of Ms. Vilsack speaking directly to camera. With Ms. Vilsack continuing to speak, the video occasionally cuts away to images of her talking to Iowans. HMP did not use any of the audio from the announcement video, nor did it use images of Ms. Vilsack talking directly to camera. Instead, HMP excerpted a few of the cutaways of Ms. Vilsack talking with Iowans – a 5-

² See <http://www.youtube.com/watch?v=YLo7GghOFEM> (1:01)

³ See <http://www.youtube.com/watch?v=YLe7GghOFEM> (0:15, 0:13)

⁴ See <http://www.youtube.com/watch?v=YLo7GghOFEM> (0:18)

second excerpt beginning at 1:01 of the announcement video, a 1-to-2 second excerpt beginning at 0:15 of the video, a 1-to-2 second clip excerpt at 0:13 of the video, and a 3-second excerpt beginning at 0:18 of the video – and integrated these into its own ad.

As noted above, HMP obtained all video excerpts of Ms. Vilsack from her publicly available YouTube channel. Any member of the public may view and download the videos at <http://www.youtube.com/watch?v=YLo7GqhQFEM>.

LEGAL DISCUSSION

The complaint alleges that the ad republished campaign materials, in violation of 11 C.F.R. § 109.23. But as the Commission's regulations and precedents demonstrate, the incidental use of publicly available video excerpts do not constitute "republishing," particularly where, as here, the excerpts do not contain any discernible message of their own, and are used solely to provide background imagery.

The purpose of the republishing rule is to "distinguish[] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a candidate."⁵ As the Commission has held on many occasions since the Act's inception,⁶ not every third party use of candidate campaign materials is "republishing" under the Act. While the "wholesale copying of candidate materials constitutes republishing," the "partial use of such materials in connection with one's own protected speech is not legally problematic."⁷

For example, the third party use of a photograph from a candidate's website does not constitute "republishing," according to a majority of the current commissioners. In MUR 5743, Commissioners Weintraub and von Spakovsky rejected the argument that the use of a photograph from a candidate's website in a third party mailer constituted "republishing," concluding that to "treat an incidental republishing of a photograph ... as an 'in-kind contribution' makes no intuitive sense."⁸ In MUR 5966, Commissioners Hunter, McGahn, and Petersen reached the same conclusion, finding that the use of a photograph from a candidate's website in a third party television ad is not "republishing," absent "some additional content or message" found in the photograph.⁹

Recently, the Commission dismissed two complaints involving allegations that third

⁵ H.R. Conf. Rep. 94-1057, 59, 1976 U.S.C.A.N. 946, 974 (1976).

⁶ See, e.g. MUR 2722 (American Medical Association) and MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee) (rejecting allegations of republishing).

⁷ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 5879 (DCCC), at 5.

⁸ Statement of Reasons of Commissioners Hans von Spakovsky and Ellen Weintraub, MUR 5743 (EMILY's List), at 4.

⁹ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5996 (Education Finance Reform Group), at 3.

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party groups "republished" candidate videos in their television ads. In MUR 5879, it was alleged that a Democratic Congressional Campaign Committee ("DCCC") ad featuring a 15-second excerpt of publicly available candidate b-roll footage was impermissible "republishing." In explaining its vote to dismiss the complaint, three commissioners pointed to several factors. First, the ad was independent speech, which communicated the third party sponsor's own views rather than those of the candidate.¹⁰ Second, the background footage was silent and "contain[ed] no discernible message" of its own.¹¹ Third, a contrary finding would hamper the ability of third party groups to run positive ads and "could perversely incentivize speakers to resort to the so-called 'negative advertising' that the sponsors of McCain-Feingold sought to discourage."¹² Relying on similar reasoning, three commissioners voted to dismiss a similar complaint against American Crossroads for the use of candidate footage in as much as half of a 30-second ad supporting Senate candidate Rob Portman.¹³

The central principle behind the DCCC and American Crossroads dismissals is that the mere use of footage "to create [one's] own message" is not "republishing" under the Act or the Commission regulations.¹⁴ HMP's use of excerpts from the Vilsack announcement video is materially indistinguishable from the uses made by the DCCC and American Crossroads. HMP obtained the excerpts from publicly available sources. And like the DCCC and American Crossroads ads, the HMP ad is not "anything close to a carbon copy" of the materials it used.¹⁵ In fact, it does not resemble it at all, wholly omitting the central element of the Vilsack announcement video – the candidate speaking to camera. The excerpts that are used appear on screen for less than half of the ad, in a different order than they appear in the Vilsack announcement video, and contain no discernible message of their own. They are mere background images, incorporated into "a communication in which [HMP] adds its own text, graphics, audio, and narration to create its own message."¹⁶

Finding a violation here, after not finding a violation in the DCCC and American Crossroads MURs, would raise serious due process concerns. Just this year, the Supreme Court affirmed that "[w]hen speech is involved," agencies must demonstrate "rigorous adherence" to two related principles: that "regulated parties should know what is required of them so that they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."¹⁷ Since the passage of McCain-Feingold, the Commission has consistently dismissed complaints

¹⁰ Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879, at 8.

¹¹ *Id.*

¹² *Id.* at 9.

¹³ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 6357 (American Crossroads).

¹⁴ Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879, at 8.

¹⁵ Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357, at 4.

¹⁶ *Id.*

¹⁷ See *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012).

alleging that the mere use of campaign photos or videos as background images in third party ads was "republishing." HMP relied reasonably on these precedents and engaged in materially indistinguishable conduct. As commissioners have noted on other occasions, "[p]roceeding in this case at this time would be unfair to [the respondent] because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against [respondent] but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances."¹⁸

Finally, we note that the application of the republication standard to find that HMP has made a contribution to the Vilsack campaign has dubious statutory support. Under the Federal Election Campaign Act, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be *an expenditure*"¹⁹ FEC regulations interpret this statutory provision to treat the "republishing of campaign materials" as an element of the "content prong" resulting in a contribution to the benefiting candidate.²⁰ It is not clear if the underlying statute can bear the weight of this regulatory interpretation where, as here, there is no allegation of coordination between the ad's sponsor and the candidate.

CONCLUSION

For the reasons set forth herein, the Commission should dismiss the complaint and close the file.

Very truly yours,


Marc E. Elias
Ezra W. Reese
Jonathan S. Berkon
Counsel House Majority PAC

¹⁸ Statement of Reasons of Chairman David M. Mason and Commissioners Darryl R. Wold and Bradley A. Smith, MUR 4994 (NY Senate 2000), at 3. See also Statement of Reasons of Karl J. Sandstrom, MURs 4553, 4671, 4407, 4544, and 4713, at 2 ("The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech.").

¹⁹ 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added).

²⁰ 11 C.F.R. §§ 109.21(c)(2), 109.23; see Statement of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357 at 3, n. 6 (noting the "seeming incongruity" between the Act and regulations on this point). The Commission need not resolve the inconsistency here, however, because the advertisement does not constitute the "republishing of campaign materials."